1999

State of Utah v. David L. Hansen : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 990856-CA
vs.	:	Priority No. 2
DAVID L. HANSEN,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT JUDICIAL COURT, UTAH COUNTY, STATE OF UTAH, BEFORE THE HONORABLE RAY M. HARDING, FROM A CONVICTION OF THEFT OF A MOTOR VEHICLE, A SECOND DEGREE FELONY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutory Provisions

Cases Cited

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. DAVID L. HANSEN, Defendant/Appellant.	: : : : : : : : : :	Case No. 990856-CA Priority No. 2

JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78-2a-3(2)(e).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the trial court committed plain error, or caused Hansen to suffer a manifest injustice, in failing to instruct the jury on the affirmative defenses to theft set forth in Utah Code Annotated § 76-6-402? To obtain appellate relief, Stanley must show: "(i) an error exists; (ii) the error should have been obvious to the trial court; (iii) the error is harmful. . . ." State v. Dunn, 850 P.2d 1201, 1208 (Utah 1993).

2. Whether Hansen was denied the effective assistance of trial counsel? "Where the ineffective assistance claim is first raised on direct appeal, this court can

only determine that the defendant was denied effective assistance of counsel if it can do so as a matter of law...If counsel's performance is clearly deficient, but prejudice cannot be determined on the record before us, remand is appropriate." State v. Snyder, 860 P.2d 351, 354 (Utah App. 1993); State v. Tennyson, 850 P.2d 461, 465 (Utah App. 1993). To establish ineffective counsel Stanley must show: "(1) that his counsel rendered a deficient performance in some demonstrable manner, and (2) that the outcome of the trial would probably have been different but for counsel's error." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hunt, 781 P.2d 473, 477 (Utah App. 1989).

CONTROLLING STATUTORY PROVISIONS

All relevant statutory and constitutional provisions are set forth in the Addenda.

STATEMENT OF THE CASE

A. Nature of the Case

David L. Hansen appeals from the judgment, sentence and commitment of the Honorable Ray M. Harding after he was convicted by a jury of Theft of a Motor Vehicle, a second degree felony.

B. Trial Court Proceedings and Disposition

David L. Hansen was charged by information filed in Fourth Circuit Court, Provo Department, on August 12, 1994, with Theft of a Motor Vehicle, a second degree felony, in violation of Utah Code Annotated §§ 76-6-404, 412 (R. 3).

On February 13, 1995, a preliminary hearing was held before Judge Steven L. Hansen at which time Hansen was bound over to Fourth District Court for trial on the charge upon a finding of probable cause (R. 19-20).

On July 5, 1995, a jury trial was held with Judge Ray M. Harding presiding and Hansen was found by the jury to be "guilty" of Theft of a Motor Vehicle, a second degree felony (R. 177, 178-180, 249).

On August 18, 1995, Hansen was sentenced to 1-15 years in the Utah State Prison (R. 183-84, 250). After sentencing, Hansen sought to stay the time to file an appeal pending resolution of the issue of restitution (R. 188). The trial court granted his motion (R. 190). On October 18, 1995, a restitution hearing was held and Hansen was ordered to pay $750 in restitution (R. 193, 251, 194-95, 202-03). After the restitution issue was resolved, Hansen appealed (R. 198-99) (Case No. 950785-CA). However, Hansen's appeal was dismissed because this Court found it lacked jurisdiction (R. 215). Hansen subsequently filed a petition for post-conviction relief (R. 220-29). The trial court granted the petition and resentenced Hansen on September

1, 1999 (R. 239). A Notice of Appeal was filed in Fourth District Court on September 30, 1999, and this action commenced (R. 242).

STATEMENT OF RELEVANT FACTS

A. Testimony of Bethany Westwood

Bethany Westwood testified that Hansen contacted her by telephone in April of 1994 and asked if he could do some work at the house that Westwood's son, Kevin Edwards, lives in for a couple of days and Westwood agreed (R. 249 at 44). At the time Westwood and Edwards owned a 1971 GMC truck (R. 249 at 45). Westwood testified that she gave the truck to Edwards, but that when he borrowed money to have the truck fixed, he added her name to the car's title by notarized signature (R. 249 at 47-48, 51-53).

B. Testimony of Kevin Edwards

Kevin Edwards testified that he lived in Provo at 355 South 600 West in a house owned by his mother (R. 249 at 54). In April of 1994, Edwards had a 1971 GMC truck (R. 249 at 55). Edwards testified that he kept the truck title in the glove compartment (R. 249 at 57). Although Edwards testified that he did not routinely keep vehicle titles in the glove box (R. 249 at 64).

Edwards testified that on April 6, 1994, Hansen was staying at his house and doing some work to earn money (R. 249 at 57). That evening, Hansen borrowed the

truck to go to Salt Lake City (R. 249 at 58). Hansen took Edwards' dog with him (Id.). Edwards testified that he told Hansen that he wanted Hansen to return in a few hours (R. 249 at 58).

Edwards testified that he never knowingly transferred the title of the truck to Hansen, that he never intended to sell Hansen the truck, and that Hansen never paid him any money for the truck (R. 249 at 60). Hansen did not return with the truck or the dog nor did he contact Edwards until after he was arrested by the police (R. 249 at 60).

Edwards admitting to consuming alcohol on April 6, 1994--"a few highballs" (R. 249 at 62).

Two days after Hansen went to work at the house, Edwards called Westwood and told her that Hansen had borrowed the truck and had not returned it (R. 249 at 46). Westwood called the police (Id.).

C. Testimony of Charlie Peterson

Charlie Peterson testified that on April 6, 1994, he was going to an AA meeting and stopped at Edwards' house in Provo (R. 249 at 69-70). Peterson asked Edwards if he wanted to go and Edwards agreed (R. 249 at 70). Peterson testified that he "gathered that Kevin and David were going to go to Salt Lake to the bar, and then Kevin decided to go with me. And it sounded to me like Kevin--not Kevin, but David was going to use the truck, and then he was going to be back later that evening" (R.

249 at 70-71). Peterson testified that Edwards agreed that Hansen could take the dog with him (R. 249 at 71). Peterson testified that Edwards had been drinking that evening but that he did not appear to be intoxicated (R. 249 at 72).

D. Testimony of Tim Meyer

Tim Meyer, a Provo City police officer, testified that in April of 1994 he was contacted by Edwards and Westwood about the theft of a 1971 GMC truck (R. 249 at 78). Meyer testified that he conducted an investigation and eventually found the truck in the possession of a Jerry Dawson in Montana (R. 249 at 79).

E. Testimony of Jerry Dawson

Jerry Dawson testified that he is a resident of Montana who met Hansen in July of 1994 (R. 249 at 87-88). Dawson 's business is located in the same building as an automotive center (R. 249 at 88). Dawson had been looking for a used engine when Hansen came into the auto center and indicated that he had an engine for sale (R. 249 at 88). Dawson testified that Hansen told him that the motor was in a wrecked truck at a wrecking yard and that he could look at it (Id.). Hansen also told Dawson that he had rolled the truck in an accident (Id.). According to Dawson, the truck--except for the engine--was demolished (R. 249 at 89). Dawson paid Hansen $425 for the engine, which was in good shape (R. 249 at 89, 96). Dawson testified that he never asked about ownership of the truck nor was he ever shown the vehicle's title (R. 249 at 91).

Approximately four months after removing the engine from the truck, Dawson, found the title in the glove box of the truck cab (R. 249 at 95).

F. Testimony of **David L. Hansen**

David Hansen testified that in early April of 1994 he called Edwards at his mother's house for a ride from Orem to Provo (R. 249 at 98). Edwards came and picked up Hansen and they drove to Edward's house (Id.). Edwards and Hansen drank together all through that evening and halfway through the night (R. 249 at 99). Hansen slept on Edwards' couch (Id.).

Edwards told Hansen that he had a car in impound and that he was trying to raise money to get it out (R. 249 at 99). Hansen testified that he did not have a vehicle at that time and he wanted to buy one (R. 249 at 99). Hansen testified during the night he made an arrangement with Edwards to purchase the truck for approximately $650, which was the amount of money Hansen had (R. 249 at 100).

Hansen testified that he had never privately purchased a vehicle before (R.249 at 100). Hansen testified that he gave Edwards the money and Edwards gave him the title to the truck which he had retrieved from his bedroom (R. 249 at 101-02).

Afterwards, Hansen and Edwards continued to drink until Edwards got invited to go to an AA meeting (R. 249 at 102). Hansen then left (R. 249 at 102). Hansen testified that when he left, Edwards' dog was in the backyard (R. 249 at 104).

Approximately 7-10 days later, Hansen testified that he drove the truck to Montana where he would be working for his brother (R. 249 at 102). Hansen testified that he planned to register the vehicle in Montana, but he got in an accident in which the truck was totaled and Hansen broke his back (R. 249 at 103).

Hansen testified that after he got out of the hospital, he sold the truck's engine to Dawson (R. 249 at 103).

Hansen testified that he believed that he was the owner of the truck (R. 249 at 104). Hansen indicated that he "thought all I had to do was send it in to the new--where I was going to get it registered, send the title in, get the title in the other state and registration in that state" (R. 249 at 104).

SUMMARY OF ARGUMENT

Hansen asserts that the trial court committed an obvious and harmful error in failing to instruct the jury on the affirmative defenses to theft set forth in Utah Code Annotated § 76-6-402(3). Furthermore, Hansen was deprived the effective assistance of counsel because of trial counsel's failure to argue or assert an affirmative defense under § 76-6-402(3).

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO INSTRUCT THE JURY ON THE AFFIRMATIVE DEFENSES TO THEFT

Hansen asserts that the trial court erred in its failure to instruct the jury on the affirmative defenses to the offense of theft set forth in Utah Code Annotated § 76-6-402(3). Even though no objection was made regarding this omission, this Court may, nonetheless, review this issue under Rule 19(c) of the Utah Rules of Criminal Procedure in order "to avoid a manifest injustice. See State v. Verde, 770 P.2d 116 (Utah 1989); and State v. Powell, 872 P.2d 1027 (Utah 1994). The Utah Supreme Court in Verde considered the meaning of "manifest injustice" and determined that "in most circumstances, the term 'manifest injustice' is synonymous with the 'plain error' standard." 773 P.2d at 121-22. Therefore, to obtain appellate relief for the trial court's failure to instruct the jury, Hansen must show: "(i) an error exists; (ii) the error should have been obvious to the trial court; (iii) the error is harmful. . . ." State v. Dunn, 850 P.2d 1201, 1208 (Utah 1993).

Utah Code Annotated § 76-6-402(3) sets forth the affirmative defenses to the offense of theft:

> It is a defense under this part that the actor:

(a) Acted under an honest claim of right to the property or service involved; or

(b) Acted under an honest belief that he had the right to obtain or exercie control over the property or service as he did; or

(c) Obtained or exercised control over the property or service honestly believing that the owner, if present, would have consented.

Hansen asserts that under the facts of this case, the jury should have been instructed on these affirmative defenses--particularly subsection (a) and/or (b). Moreover, Hansen asserts that under the facts of this case, it was obvious and harmful error for the trial court not to so instruct the jury--error which caused Hansen to suffer a manifest injustice.

According to Hansen's testimony, he bought the truck from Edwards for $650 approximately 7-10 days before leaving for Montana (R. 249 at 99-102). Even Edwards acknowledged that Hansen had permission to take the truck (R. 249 at 58). Moreover, according to Hansen, Edwards retrieved the title to the truck from the bedroom (R. 249 at 101-02), which is more consistent with Westwood's testimony that she believed that the title was in a bedroom than was Edwards' testimony that he kept the title in the truck's glove box (R. 249 at 57).

Hansen asserts that the jury should have been instructed that it was a defense to the offense of theft if he "acted under an honest claim of right to the property" or if he "acted in the honest belief that he had the right to obtain or exercise control over the property". The evidence presented at trial clearly established such a defense. The trial court's failure to so instruct the jury was not only obvious error but it was also harmful because it robbed Hansen of a reasonable likelihood of a more favorable result. *See*, State v. Stringham, 957 P.2d 602, 609 (Utah App. 1998) and State v. Cude, 383 P.2d 399, 401 (Utah 1963) (If at the time of the taking of the property by the defendant, he in good faith believed said property was his, or if the jury had reasonable doubt to that effect, then he should be acquitted).

Accordingly, Hansen requests that this Court reverse his conviction and remand the case back to the Fourth District for new proceedings because of the manifest injustice which Hansen suffered because of the trial court's failure to instruct the jury as to the affirmative defenses to theft.

POINT II

HANSEN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

Typically, a claim of ineffective assistance of counsel is raised concurrently with an allegation of plain error because if the error was plain to the court, it should also

have been plain to trial counsel. *See*, Dunn, 850 P.2d at 1208-09, 1225-29 (Utah 1993); and State v. Brooks, 868 P.2d 818, 826 (Utah App. 1994).

As a result, this Court should conclude as a matter of law that, based upon the obvious and harmful failure of trial counsel to request that the jury be instructed as to the affirmative defenses to theft, Hansen was denied the effective assistance of counsel. See State v. Snyder, 860 P.2d 351, 354 (Utah App. 1993) ("Where the ineffective assistance claim is first raised on direct appeal, this court can only determine that the defendant was denied effective assistance of counsel if it can do so as a matter of law.").

In determining whether Hansen was denied the effective assistance of counsel "this court cannot apply rigid mechanical rules, but instead must focus `on the fundamental fairness of the proceeding whose result is being challenged.'" Strickland v. Washington, 466 U.S. 668, 670, 104 S.Ct 2052, 2056 (1984); State v. Snyder, 860 P.2d 351, 354 (Utah App. 1993).

In order to establish ineffective counsel, "it is the Defendant's burden to show: (1) that his counsel rendered a deficient performance in some demonstrable manner,

and (2) that the outcome of the trial would probably have been different but for counsel's error." State v. Hunt, 781 P.2d 473, 477 (Utah App. 1989).

To satisfy the first part of the Strickland test, Hansen must show that counsel's representation fell below an objective standard or reasonableness, but the court is not to second-guess trial counsel's legitimate strategic choices. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065; State v. Tennyson, 850 p.2d 461, 465 (Utah App. 1993); Crestani, 707 P.2d at 1089. It should have been obvious to counsel--as well as the court--that the evidence produced at trial created more than a reasonable likelihood of an affrimative defense under § 76-6-402(3). Therefore, counsel should have requested that the jury be instructed as to the defenses. Likewise, counsel had an obligation to present and argue a defense to the charge. His failure to argue the statutory defenses set forth in the Utah Code robbed Hansen of competent representation.

The second prong of the Strickland test is satisfied only by showing there is a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability has been described as "a probability sufficient to undermine the confidence in the outcome." *See* Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Crestani, 771 P.2d at 1092. In this particular case the

adversarial process cannot be relied on as having produced a just result. Had counsel done his homework with respect to the facts of the case and the available defenses under § 76-6-402(3), then the jury would have been instructed as to the statutory defenses to theft and Hansen would have had a reasonable likelihood of a more favorable result.

Therefore, this Court should vacate Stanley's convictions on grounds that "counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result."

CONCLUSION AND PRECISE RELIEF SOUGHT

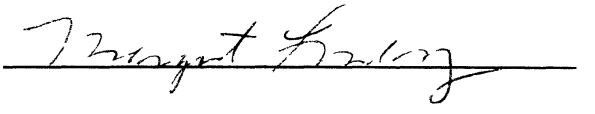
Hansen asks that this Court reverse his convictions and remand the matter to Fourth District Court because the trial court committed obvious and harmful error, and trial counsel rendered deficient and prejudicial representation, in their failure to instruct the jury as to the affirmative defenses to theft set forth in the Utah Code.

RESPECTFULLY SUBMITTED this 14 day of April, 2000.

Margaret P. Lindsay
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief Of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 14 day of April, 2000.



ADDENDA

estate, tangible and intangible personal property, captured or domestic animals and birds, written instruments or other writings representing or embodying rights concerning real or personal property, labor, services, or otherwise containing anything of value to the owner, commodities of a public utility nature such as telecommunications, gas, electricity, steam, or water, and trade secrets, meaning the whole or any portion of any scientific or technical information, design, process, procedure, formula or invention which the owner thereof intends to be available only to persons selected by him.

(2) "Obtain" means, in relation to property, to bring about a transfer of possession or of some other legally recognized interest in property, whether to the obtainer or another; in relation to labor or services, to secure performance thereof; and in relation to a trade secret, to make any facsimile, replica, photograph, or other reproduction.

(3) "Purpose to deprive" means to have the conscious object:

(a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or

(b) To restore the property only upon payment of a reward or other compensation; or

(c) To dispose of the property under circumstances that make it unlikely that the owner will recover it.

(4) "Obtain or exercise unauthorized control" means, but is not necessarily limited to, conduct heretofore defined or known as common-law larceny by trespassory taking, larceny by conversion, larceny by bailee, and embezzlement.

(5) "Deception" occurs when a person intentionally:

(a) Creates or confirms by words or conduct an impression of law or fact that is false and that the actor does not believe to be true and that is likely to affect the judgment of another in the transaction; or

(b) Fails to correct a false impression of law or fact that the actor previously created or confirmed by words or conduct that is likely to affect the judgment of another and that the actor does not now believe to be true; or

(c) Prevents another from acquiring information likely to affect his judgment in the transaction; or

(d) Sells or otherwise transfers or encumbers property without disclosing a lien, security interest, adverse claim, or other legal impediment to the enjoyment of the property, whether the lien, security interest, claim, or impediment is or is not valid or is or is not a matter of official record; or

(e) Promises performance that is likely to affect the judgment of another in the transaction, which performance the actor does not intend to perform or knows will not be performed; provided, however, that failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed. 1973

76-6-402. Presumptions and defenses.

The following presumption shall be applicable to this part:

(1) Possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property.

(2) It is no defense under this part that the actor has an interest in the property or service stolen if another person also has an interest that the actor is not entitled to infringe, provided an interest in property for purposes of this subsection shall not include a security interest for t repayment of a debt or obligation.

(3) It is a defense under this part that the actor:

(a) Acted under an honest claim of right to t property or service involved; or

(b) Acted in the honest belief that he had the rig to obtain or exercise control over the property service as he did; or

(c) Obtained or exercised control over the proper or service honestly believing that the owner, present, would have consented. 19

76-6-403. Theft — Evidence to support accusation.

Conduct denominated theft in this part constitutes a sing offense embracing the separate offenses such as those here fore known as larceny, larceny by trick, larceny by bailee embezzlement, false pretense, extortion, blackmail, receivi stolen property. An accusation of theft may be supported l evidence that it was committed in any manner specified i Sections 76-6-404 through 76-6-410, subject to the power o the court to ensure a fair trial by granting a continuance o other appropriate relief where the conduct of the defens would be prejudiced by lack of fair notice or by surprise. 19

76-6-404. Theft — Elements.

A person commits theft if he obtains or exercises unautho rized control over the property of another with a purpose t deprive him thereof. 19

76-6-405. Theft by deception.

(1) A person commits theft if he obtains or exercises contro over property of another by deception and with a purpose t deprive him thereof.

(2) Theft by deception does not occur, however, when there is only falsity as to matters having no pecuniary significance or puffing by statements unlikely to deceive ordinary persons in the group addressed. "Puffing" means an exaggerated commendation of wares or worth in communications ad dressed to the public or to a class or group. 19

76-6-406. Theft by extortion.

(1) A person is guilty of theft if he obtains or exercises control over the property of another by extortion and with a purpose to deprive him thereof.

(2) As used in this section, extortion occurs when a person threatens to:

(a) Cause physical harm in the future to the person threatened or to any other person or to property at any time; or

(b) Subject the person threatened or any other person to physical confinement or restraint; or

(c) Engage in other conduct constituting a crime; or

(d) Accuse any person of a crime or expose him to hatred, contempt, or ridicule; or

(e) Reveal any information sought to be concealed by the person threatened; or

(f) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(g) Take action as an official against anyone or anything, or withhold official action, or cause such action or withholding; or

(h) Bring about or continue a strike, boycott, or other similar collective action to obtain property which is not demanded or received for the benefit of the group which the actor purports to represent; or

(i) Do any other act which would not in itself substantially benefit him but which would harm substantially any other person with respect to that person's health, safety, business, calling, career, financial condition, reputation, or personal relationships. 19

(4) "Telecommunication device" means:

(a) any type of instrument, device, machine, or equipment which is capable of transmitting or receiving telephonic, electronic, or radio communications; or

(b) any part of an instrument, device, machine, or equipment, or other computer circuit, computer chip, electronic mechanism, or other component, which is capable of facilitating the transmission or reception of telephonic or electronic communications within the radio spectrum allocated to cellular radio telephony.

(5) "Telecommunication service" includes any service provided for a charge or compensation to facilitate the origination, transmission, emission, or reception of signs, signals, writings, images, and sounds or intelligence of any nature by telephone, including cellular telephones, wire, radio, television optical or other electromagnetic system.

(6) "Telecommunication service provider" means any person or entity providing telecommunication service including a cellular telephone or paging company or other person or entity which, for a fee, supplies the facility, cell site, mobile telephone switching office, or other equipment or telecommunication service.

(7) "Unlawful telecommunication device" means any telecommunication device that is capable of, or has been altered, modified, programmed, or reprogrammed, alone or in conjunction with another access device, so as to be capable of, acquiring or facilitating the acquisition of a telecommunication service without the consent of the telecommunication service provider. Unlawful devices include tumbler phones, counterfeit phones, tumbler microchips, counterfeit microchips, and other instruments capable of disguising their identity or location or of gaining access to a communications system operated by a telecommunication service provider. 1994

76-6-409.6. Use of telecommunication device to avoid lawful charge for service — Penalty.

(1) Any person who uses a telecommunication device with the intent to avoid the payment of any lawful charge for telecommunication service or with the knowledge that it was to avoid the payment of any lawful charge for telecommunication service is guilty of:

(a) a class B misdemeanor, if the value of the telecommunication service is less than $300 or cannot be ascertained;

(b) a class A misdemeanor, if the value of the telecommunication service charge is or exceeds $300 but is not more than $1,000;

(c) a third degree felony, if the value of the telecommunication service is or exceeds $1,000 but is not more than $5,000; or

(d) a second degree felony, if the value of the telecommunication service is or exceeds $5,000.

(2) Any person who has been convicted previously of an offense under this section shall be guilty of a second degree felony upon a second conviction and any subsequent conviction. 1995

76-6-409.7. Possession of any unlawful telecommunication device — Penalty.

(1) Any person who knowingly possesses an unlawful telecommunication device shall be guilty of a class B misdemeanor.

(2) If any person knowingly possesses five or more unlawful telecommunication devices in the same criminal episode, he shall be guilty of a class A misdemeanor. 1994

76-6-409.8. Sale of an unlawful telecommunication device — Penalty.

(1) Any person shall be guilty of a class A misdemeanor who intentionally sells an unlawful telecommunication device or material, including hardware, data, computer software, or other information or equipment, knowing that the purchaser or a third person intends to use such material in the manufacture of an unlawful telecommunication device.

(2) If the offense under this section involves the intentional sale of five or more unlawful telecommunication devices within a six-month period, the person committing the offense shall be guilty of a third degree felony. 1994

76-6-409.9. Manufacture of an unlawful telecommunication device — Penalty.

(1) Any person who intentionally manufactures an unlawful telecommunication device shall be guilty of a class A misdemeanor.

(2) If the offense under this section involves the intentional manufacture of five or more unlawful telecommunication devices within a six-month period, the person committing the offense shall be guilty of a third degree felony. 1994

76-6-409.10. Payment of restitution — Civil action — Other remedies retained.

(1) A person who violates Sections 76-6-409.5 through 76-6-409.9 shall make restitution to the telecommunication service provider for the value of the telecommunication service consumed in violation of this section plus all reasonable expenses and costs incurred on account of the violation of this section. Reasonable expenses and costs include expenses and costs for investigation, service calls, employee time, and equipment use.

(2) Criminal prosecution under this section does not affect the right of a telecommunication service provider to bring a civil action for redress for damages suffered as a result of the commission of any of the acts prohibited by this section.

(3) This section does not abridge or alter any other right, action, or remedy otherwise available to a telecommunication service provider. 1996

76-6-410. Theft by person having custody of property pursuant to repair or rental agreement.

A person is guilty of theft if:

(1) Having custody of property pursuant to an agreement between himself or another and the owner thereof whereby the actor or another is to perform for compensation a specific service for the owner involving the maintenance, repair, or use of such property, he intentionally uses or operates it, without the consent of the owner, for his own purposes in a manner constituting a gross deviation from the agreed purpose; or

(2) Having custody of any property pursuant to a rental or lease agreement where it is to be returned in a specified manner or at a specified time, intentionally fails to comply with the terms of the agreement concerning return so as to render such failure a gross deviation from the agreement. 1973

76-6-411. Repealed. 1974

76-6-412. Theft — Classification of offenses — Action for treble damages against receiver of stolen property.

(1) Theft of property and services as provided in this chapter shall be punishable:

(a) as a felony of the second degree if the:

(i) value of the property or services is or exceeds $5,000;

(ii) property stolen is a firearm or an operable motor vehicle;

(iii) actor is armed with a deadly weapon at the time of the theft; or

(iv) property is stolen from the person of another;

(b) as a felony of the third degree if the: